STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of MADISON KABAT, Minors

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

KURT KABAT,

Respondent-Appellant.

UNPUBLISHED
April 7, 2009

Nos. 286481
Macomb Circuit Court
Family Division
LC Nos. 2007-000324-NA

In the Matter of SKYLAR KABAT, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

KURT KABAT,

Respondent-Appellant.

No. 286482
Macomb Circuit Court
Family Division
LC No. 2007-000323-NA

In the Matter of KYLE KABAT, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

KURT KABAT,

Respondent-Appellant.

No. 286483
Macomb Circuit Court
Family Division
LC No. 2007-000362-NA

Before: Murray, P.J., and Gleicher and M.J. Kelly, JJ.

PER CURIAM.

In these consolidated appeals, respondent appeals as of right the trial court's order terminating his parental rights to the minor children under MCL 712A.19b(3)(c)(i), (g), and (j). We reverse and remand for further proceedings.

I. Facts and Proceedings

Respondent and his wife, Melissa Kabat, were the parents of MK, SK and KK. During June 2006, respondent and Melissa were substantiated for neglecting MK and SK (KK was not yet born). At this time, respondent was unemployed and the family was homeless and living in a shelter. In October 2006, after respondent and Melissa worked with in-home services and received financial assistance for housing, their case was closed. By late April 2007, however, Melissa, who was expecting a third child, was struggling with substance abuse and had committed retail fraud, and the family was residing in a hotel, prompting Protective Services involvement again.[1] Services were again attempted to address substance abuse, money management, housing, and parenting issues. Approximately one month later, in May 2007, MK and SK were removed from respondent and Melissa's care due to substance abuse and homelessness, and placed in foster care.[2]

Shortly thereafter, on May 20, 2007, Melissa gave birth to KK and tested positive for cocaine. KK was immediately removed from respondent and Melissa's care and placed in foster care.

On June 8, 2007, the court assumed jurisdiction over the children pursuant to respondent's no-contest plea, wherein he admitted to the allegations that the family had previously received services to work on their issues, they had previously been substantiated for neglect, Melissa tested positive for cocaine at the time of KK's birth, and respondent had a criminal history, including "misdemeanor retail fraud" in 1998, "possession of a controlled substance" (cocaine) in 1999, "misdemeanor stolen property" in 2006, and "misdemeanor retail fraud" in January 2007. Thereafter, the court adopted and ordered the parents to comply with a parent-agency agreement, which required respondent to (1) undergo a psychological evaluation, (2) complete parenting classes and demonstrate adequate parenting skills, (3) obtain and maintain appropriate housing, (4) demonstrate financial independence and stability, (5) attend a

[1] According to respondent, during this time he was gainfully employed and the family was staying at a hotel because they were "in the middle" of purchasing a manufactured home. Respondent had been employed in the auto industry but had been laid off.

[2] The Department of Human Services worker testified at the May 4, 2007, hearing that the biggest issue was Melissa's substance abuse.

substance abuse assessment, (6) undergo random drug screens, (7) consistently attend visits, (8) maintain contact with his caseworker, and (9) "clear up" his legal issues.

Unfortunately, in July 2007, approximately two months after the children's removal from their parents' care, Melissa died due to the "toxic effect of drugs." Respondent naturally had difficulty with his wife's death, and thereafter his visits with the children and drug screens were inconsistent due to his "grief and loss."[3] However, as recognized by the DHS at the August 20, 2007, hearing, because of the mother's death in July, and since the court had only taken jurisdiction in May, by late August the parties were "just in the process of starting the [parent-agency agreement], all of the terms and conditions." All parties involved also recognized that because of Melissa's death, any missed visits or screens by respondent in July and early August would be excused.

At some point, however, respondent underwent a substance abuse evaluation at the Cantonese Clinic, after which the therapist who performed the evaluation, the caseworker, and respondent agreed that respondent should attend an inpatient treatment program located in Kentucky to address alcohol abuse. Importantly, at a September 7, 2007, hearing the DHS worker strongly encouraged respondent to attend the Kentucky in-patient program, as he needed to take care of himself before he could take care of his children:

> Through the (inaudible) Clinic Counseling Center, and it's a really good in-patient clinic for substance abuse and other issues to be addressed and I think that offer is still on the table for him to do that. He was hesitant to go because he doesn't want to miss out on visiting with his children, but I told him if it's going to help him, then I would by all means go get it done. You've got to take care of yourself before you can take care of your kids.

Thus, in September 2007, respondent went to Kentucky and started the treatment program, which according to respondent, addressed substance abuse, parenting skills, anger management, and "every issue" needed to become a more productive person. During the first 90 days in the treatment program, respondent was not permitted leave to visit his children, but after 2½ months he was allowed him to return to Michigan to visit them, and he did so again after attending the treatment program for 90 days. According to respondent, during this time he was not allowed to telephone or write his children because they were in foster care.

In December 2007, after completing 90 days of treatment, respondent became eligible for employment and housing and "gained" a four-bedroom home and employment (paying $26 an hour) in Kentucky. Respondent indicated to the caseworker and referee during a review hearing that he hoped to transition his children to Kentucky, but the referee "shot it down." The caseworker and referee believed that remaining in Kentucky was not the "best situation" because the children were in protective custody in Michigan, were bonding with the aunt and foster parents, and thus it would be unreasonable for them to go to Kentucky with him. Respondent

[3] Specifically, during the reporting period ending September 7, 2007, respondent attended eight out of 12 offered visits.

stayed in Kentucky for five additional weeks while attempting to locate employment in Michigan, but despite his efforts (he sent out at least 30 to 40 resumes), he was unable to obtain employment in Michigan. He then returned to Michigan to be near his children.

After returning to Michigan, respondent stayed with some members of his church and resided at shelters. During this time, according to respondent, he contacted the caseworker "countless times" and requested the children's social security numbers, which he needed to obtain section eight housing, but she refused to provide him the necessary documents. Respondent began visiting the children, but he did not visit on a consistent basis.[4] Respondent attributed his missed visits to his medical problems, including a heart condition for which he was hospitalized for five to ten days in April, depression, degenerated disks in his neck, and transportation difficulties.[5]

According to the caseworker, during the visits respondent demonstrated appropriate parenting skills, and "the visits are without incident." During the visits, the eldest child, MK, had frequent temper tantrums, and was "very clingy" with respondent, wanting to sit on his lap and hug him constantly. MK also got very upset when respondent tried to put her down and pick up SK; SK "pretty much" did his "own thing" and did not interact with respondent; and KK, then under one year old, was placed in a seat in front of respondent or held by him. Sometimes when visits ended MK would "kick and scream" because she did not want to leave respondent. The DHS worker ended the March hearing by recognizing that respondent was "making such significant progress on his Parent/Agency Agreement thus far, in regards to the random drug screens and in regards to doing a psychological evaluation and participating in parenting classes . . . ."

As the DHS worker indicated, in February 2008, respondent underwent a psychological evaluation where testing revealed that respondent's conceptual skills were "quite good," he did not appear to be an "inherently abusive type parent," and he did not manifest a high propensity to relapse. The evaluation stated that respondent had "dysphoria and chronic low grade depression," for which the evaluator felt counseling would be beneficial, and also recommended parenting classes.

In March 2008, respondent began working at the "Flower Castle" earning approximately $150 to $300 per week "under the table." Respondent never provided his caseworker with any verification of employment and admitted that he was not gainfully employed. In April 2008, however, respondent had a second full-time employment opportunity, this time with General Electric in Cincinnati, Ohio, making $20 per hour plus benefits and retirement, working Monday through Friday. To accommodate his work schedule, respondent requested weekend visits with the children, which petitioner could not facilitate. Indeed, despite all the prior encouragement

[4] Specifically, he missed two visits during February 2008 due to transportation issues and illness, he missed three visits during March 2008, and he did not visit at all during April 2008.

[5] Because of his transportation difficulties, the foster care agency provided transporters to transport him to the visits, which did not "work out" because the transportation was "very inconsistent" or respondent was not at the "right spot" or not on time.

respondent had received since he successfully returned to Michigan in January, and despite recognizing that employment and housing were the top priorities for stability, the referee strongly rebuffed respondent's opportunity at General Electric:

> Mr. Lavigne, I don't want this to be a group discussion and frankly, what your client is saying to me is not the least bit acceptable to this Court. If you can ask him questions, but I want directed questions. And the fact that he's going to go on about his wonderful opportunity for him, honestly, what his personal needs are, I could care less. All I know is, these kids have been in care for almost a year now and the only thing he has done is what he thinks is good for him and nothing for these kids. It's insulting to me. And the fact that now he wants to abandon these kids again and run to another state, to chase another opportunity that may or may not work out is insulting to me. And so I don't know if you want to keep asking him questions, but he is not benefiting himself in the eyes of this Court.

Accordingly, respondent did not pursue the opportunity.

Around April 2008, respondent began residing in a two-bedroom condominium owned by his brother-in-law. According to respondent, he paid what he could to his family for rent and utilities, but he admitted that he did not have a lease and that his family was providing him with assistance until he could "get on his feet."[6] At some point, respondent also purchased a vehicle, but he had a suspended driver's license due to outstanding unpaid traffic tickets. On April 22, 2008, respondent was arrested for larceny. It was alleged that he had attempted to steal license plates off of a vehicle. According to respondent, his arrest resulted because the vehicle he had purchased had a stolen license plate on it, of which he was not aware.

On May 1, 2008, less than a month after respondent was chastised for his employment opportunity at GE, petitioner filed a petition to terminate respondent's parental rights, and the court suspended his visits with the children. During the remainder of the proceedings, respondent did not contact his caseworker because she told him that she was terminating his rights and would no longer be providing services to him. By the time of the termination trial in June 2008, respondent continued to attend parenting classes and counseling.[7] According to respondent, he had not used alcohol since before September 2007 and had not used drugs "in years." He continued to reside in the condominium owned by his brother-in-law, which respondent believed could adequately accommodate the children. Further, he had a crib, car seats for the children, and could get "ample food" for them.

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[6] Respondent never provided the caseworker with a lease, notified her about his residence, or requested a home study.

[7] During June 2008, respondent was hospitalized for depression for eight or nine days due to his wife's death and the termination proceedings concerning his children. Thereafter, respondent began taking medication to address his depression and attending weekly counseling, which he obtained on his own.

Respondent, who had applied for at least 40 jobs in the five months prior to June 2008 without success (save, of course, the GE and Kentucky positions), continued to work part-time at the "Flower Castle" while he searched for gainful employment. He planned to obtain gainful employment and housing for the children and had arranged for daycare through his church for which he believed petitioner would assist with the cost. He believed he could implement his plan within three months, indicating that he would work three part-time jobs if necessary. The caseworker had also applied for death benefits for the children's care on behalf of their mother. At the time of the termination trial, respondent had approximately $1,300 and was expecting an additional $4,600 in income tax refunds, which he intended to use to obtain independent housing. Respondent also planned to pursue reinstatement of his suspended driver's license by paying off outstanding traffic tickets totaling approximately $400.

After conducting a termination trial, the trial court found that clear and convincing evidence supported statutory grounds for termination under subsections (c)(i) (conditions that led to the adjudication continue to exist), (g) (failure to provide proper care and custody), and (j) (reasonable likelihood of harm if the children returned to respondent's home). MCL 712A.19(3)(c)(i), (g) and (j). In doing so, the court first recognized that stability was the ultimate goal and issue addressed by the parent-agency agreement:

> A parent agency agreement made eminently clear that stability was what the Department of Human Services was looking for. That's [what] they needed for the children. That was the goal. That goal included employment, housing, they needed assurance that there was not a drug problem which required testing, the condition associated with testing.

The court then found that, although respondent clearly loved his children, the children's needs could no longer be delayed and that termination was not contrary to the children's best interests. Pertinent to the court's findings was respondent's inability to gain stability and make progress during the proceedings. The court then entered an order terminating respondent's parental rights to the children, and this appeal ensued.

II. Analysis

As we recently held in *In re Jenks*, 281 Mich App 514, 516; 760 NW2d 297 (2008):

> To terminate parental rights, the trial court must find that at least one of the statutory grounds for termination set forth in MCL 712A.19b(3) has been established by clear and convincing evidence. *In re Sours*, 459 Mich 624, 632; 593 NW2d 520 (1999); *In re Terry*, 240 Mich App 14, 21-22; 610 NW2d 563 (2000). Once a ground for termination is established, the court must order termination of parental rights unless there is clear evidence, on the whole record, that termination is not in the child's best interest. MCL 712A.19b(5); *In re Trejo*, 462 Mich 341, 354; 612 NW2d 407 (2000).

Before addressing respondent's specific arguments on appeal, we also recognize the standards of review applicable in reviewing the trial court's decision:

> This Court reviews the trial court's determinations that a ground for termination has been established and regarding the child's best interest under the "clearly erroneous" standard. MCR 3.977(J); *Sours*, *supra* at 633; *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005). A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003); *In re LE*, 278 Mich App 1, 18; 747 NW2d 883 (2008). [*Jenks*, *supra* at 516-517.]

As noted, the trial court terminated respondent's parental rights under MCL 712A.19b(3)(c)(i), (g), and (j), which provide:

> (c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:
>
> (i) The conditions that led to the adjudication continue to exist *and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age*.
>
> ***
>
> (g) The parent, without regard to intent, fails to provide proper care or custody for the child *and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time* considering the child's age.
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> ***
>
> (j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent. [Emphasis added.]

Upon review of the record, we hold that there was clear and convincing evidence that respondent did not rectify the conditions leading to adjudication, MCL 712A.19b(3)(c)(i). *In re Jackson*, 199 Mich App 22, 25; 501 NW2d 182 (1993). The conditions that led to the adjudication of the children involved a lack of stability and substance abuse.[8] It was undisputed that by the time of the termination trial, respondent remained unable to provide physical stability for the children in that he lacked stable housing and gainful employment to support them. Respondent also failed to fully comply with other aspects of his court-ordered parent-agency agreement intended to address the conditions that led to the adjudication, i.e., incomplete screens and sporadic attendance at visitations.

[8] The supplement to the petition indicated no substance abuse concerns with respect to respondent. All the facts and allegations of substance abuse regarded Melissa.

However, and while recognizing the superior position of the trial court, we hold that petitioner did not provide clear and convincing evidence that respondent was not reasonably likely to provide proper care and custody for the children within a reasonable time to support termination under MCL 712A.19b(3)(c)(i) or (g). *Jackson, supra* at 25. The trial court's ultimate conclusion was that respondent had come up with nothing to establish stability. For example, the trial court stated in its ruling that respondent chose Kentucky over opportunities in Michigan that could have fostered reunification. However, the record unequivocally shows that the DHS encouraged respondent to go to the Kentucky program, as it was a good program and would benefit respondent in the short term and the family in the long term. And, once respondent's request to have the children relocated to Kentucky (where he had a job offer and housing available) was rejected by the DHS and the court, respondent returned to Michigan to be close to the children, even though he was successful in the program.

The trial court also stated that "maybe" there were better employment opportunities in Kentucky or Cincinnati, but that respondent had the opportunity to do something but did not. Yet, once again the record shows that it was the DHS and the referee that not only discouraged respondent's concrete employment opportunities, but also chastised him for them.[9] Moreover, just two months prior to termination, the DHS was *commending* respondent on his progress, and respondent had obtained a psychological evaluation that did not find any significant problem areas. And, although respondent missed some drug screens and visitations, he was never found to have been on drugs during these proceedings (drug use was never an issue with respondent) and his visitations and interaction with the children were considered to be "without incident."

Additionally, petitioner did not provide clear and convincing evidence that the children would likely be harmed if returned to respondent's home to support termination under MCL 712A.19b(3)(j). *Id*. As respondent argues on appeal, there was no evidence that the children had ever been physically harmed while in his care. Instead, the alleged risk of harm to the children arose from his ongoing economic instability and failure to demonstrate that he could provide them with the stability, consistency, and permanency they needed. But, again, the DHS and the referee did not work with respondent on scheduling visitation so that he could work at GE. There were also no attempts to work out a relocation plan to Kentucky, even though the DHS approved of the program that eventually allowed respondent to obtain a job and housing. So, after all of this, respondent chose to stay in Michigan – working a job "under the table" – so he could be near his children and have some level of income. The result? Termination, the most severe sanction against a parent. Under such circumstances, the trial court clearly erred in terminating respondent's parental rights under MCL 712A.19b(3)(j). *Trejo, supra* at 356-357.

It is also important to recognize that respondent was in full compliance with the DHS requirements when he was in the Kentucky program from September through December 2007, and that from June to August 2007, the obligations under the parent-agency agreement had just

[9] Indeed, we are deeply concerned by the referee's statements to respondent about the GE job. Here, respondent's biggest hurdle to reunification was employment and housing, yet when he appears before the referee with a $20 an hour job with benefits, with a solid company, he is chastised as being selfish. We believe this was inappropriate, to say the least.

commenced and any difficulties respondent had meeting commitments were "forgiven" because of Melissa's death. So, respondent's finding two solid employment opportunities, job search, visitations with the children, and psychological testing, all occurred during a three-month period from January to April 2008. During that time, the DHS also opined that respondent was performing well under the parent-agency agreement.

Respondent also argues that the trial court erred in its best interest determination. We agree. Under the law in effect when the termination order was entered, the trial court was required to terminate parental rights after finding a statutory ground under MCL 712A.19b(3), unless it determined that termination was clearly not in the child's best interests. MCL 712A.19b(5)[10]; *Trejo, supra* at 354. Although testimony indicated that respondent did not visit the children on a regular basis despite their need for consistency, and that they currently needed stability and permanency, it was also well established that respondent had good parenting skills, that the visitations were appropriate, and that the two older children got upset when they had to end a visitation. Additionally, the trial court noted that respondent clearly loved his children. And, as noted, there was no evidence or suggestions of physical or mental abuse by respondent, or drug use. On this record, his willingness to parent the children "clearly overwhelmed," *Id*. at 364, his failure to gain physical stability and to fully comply with all the necessary requirements intended to rectify his conditions. Accordingly, the evidence showed that termination of respondent's parental rights was clearly not in the children's best interests. MCL 712A.19b(5). There was clear error in the court's decision to terminate his parental rights. *Id*. at 356-357.

We are fully cognizant that the public policy of the state is to not allow children to unnecessarily linger in foster care while parents fail to make strides to reunification. But our decision in this case does not run afoul of this policy, as respondent – given the circumstances – made significant progress in the five months he had between the trial and his return from Kentucky. He had found two employment positions, but could accept neither because petitioner would not permit him to regain custody of his children if he became gainfully employed outside the State of Michigan. The trial court terminated respondent's rights despite that he had more than satisfactory psychological evaluations and drug screens, positive visits with his children, housing, and continued to actively search for employment in Michigan. On this record, petitioner failed to carry its burden of proving both unfitness and that termination of respondent's parental rights was not contrary to the children's best interests.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly

[10] MCL 712A19b(5) was recently amended such that a trial court must now find that termination of parental rights is in the child's best interests. 2008 PA 199, effective July 11, 2008.